

August 1, 2006

Mr. Jeffery M. Wilson
Attorney at Law
446 NW 3rd Suite 230
Prineville, OR 97754

Mr. Edward P. Fitch
Attorney at Law
PO Box 457
Redmond, OR 97756

Mr. Ross A. Day
Attorney at Law
Oregonians In Action Legal Center
PO Box 230637
Tigard, OR 97281

Mr. Donald Joe Willis
Schwabe, Williamson & Wyatt
549 SW Mill View Way, Suite 100
Bend, OR 97702

Ms. Katherine G. Georges
1162 Court Street
Salem, OR 97301

RE: Crook County v All Electors et al
Crook County Circuit Court Case No. 05CV0015

Dear Counsel:

This letter has been prepared to express the decision of this court upon the issues presented by the parties during the arguments on June 1, 2006.

I wish to reiterate my comments made at the conclusion of the June hearing. Each counsel was well prepared, concise, patient and respectful of one another's opportunity to present argument. Such conduct exemplifies the highest calling of the profession we share.

This matter comes before the court due to a lawsuit initiated by Crook County. Petitioner requests this court exercise its authority to conduct a judicial examination of Ordinance 153 under the provisions of ORS 33.710 through ORS 33.720. While the Amended Petition does not contain a prayer, the allegations seek a judgment which would determine "...the legality and regularity..." of Ordinance 153. The State of Oregon seeks to have the second sentence of Section 12 of Ordinance 153 declared invalid. Martin's and Reimenschneider's positions are disclosed in their pleadings, motions for summary judgment and memorandums supporting the motions. While Mr. Hunnicutt asserts this case is not justiciable, he has appeared and asserts Ordinance 153 impermissibly impairs a landowner's ability to assert a claim under ORS 197.352(6).

FACTS:

The essential facts applicable to the case at bar are undisputed.

An initiative known as Measure 37 was passed by the electorate of the State of Oregon on November 2, 2004. As required by the Measure, the provisions were codified into Chapter 197 of the Oregon Revised Statutes. See, **ORS 197.352** The Crook County Court adopted an ordinance on November 24, 2004. The County Court amended the same ordinance on January 5, 2005. The amended ordinance, hereinafter described as Ordinance 153, was designed to be used by the County for the administration of claims filed pursuant to ORS 197.352.

Respondents, Martin and Reimenschneider, own separate parcels of land in Crook County, Oregon. Each land owner filed a written claim with the Crook County under Ordinance 153. The landowners claimed land use regulations adopted by Crook County after the date they acquired their parcels of land diminished the value of their lands and that each was entitled to just compensation or, in the alternative, relief from the offending regulations. The claims were received and reviewed by the appropriate county official. County representatives notified the claimants the applications lacked necessary information and could not be "deemed complete." Both Respondents refused to provide the additional documentation.

Ordinance 153 required an application must be "deemed complete" before the County hearings process would commence. By stipulation of the parties, this court became aware the Crook County Court conducted hearings into the merits of each claim even though the applications had not been "deemed complete". After the hearings the Crook County Court entered an order on each claim. The Court denied Reimenschneider's claim. On the 22nd day of June, 2005, the Crook County Court granted a "waiver" to the Martins and ordered:

“In lieu of compensation ...[Martins]...shall be authorized to submit a conditional use permit for the division of ...[two parcels of land]...in accordance with the land use regulations in effect on May 15, 1978, and no land use enactments or enforcement actions shall be applied...[except as permitted under **ORS 197.352(3)]...**” **Crook County Court Order 2005-61**

Martins intend to divide their land and sell the created lots to third parties under the authority of Crook County Court Order 2005-61 and the provisions of Ordinance 153, Section 12. The ability to proceed with their goal has been impaired because financial institutions and insurance providers are reluctant to furnish needed services. The reluctance is generated from a perceived dispute between the authority stated in Section 12 of Ordinance 153 and an advisory letter issued by the Office of the Oregon Attorney General dated February 24, 2005. A copy of the opinion is attached to the State’s Answer and Response as Exhibit 1.

DECISION

Several motions for summary judgment have been filed. The primary focus of the motions are:

- I. Reimenschneider and Martin -
 - A) Motion 1 - Is a motion for summary judgment against Crook County asking this court to find that the provisions of Section 5 of Amended Ordinance 153 be found “...invalid and inconsistent with the express provisions of [ORS 197.352]...”. (Motion 1 - Points and Authorities - pg 3, ln 19)
 - B) Motion 2 - Seeks Summary Judgment against the State of Oregon “...ruling that development rights exercised by a property owner under [a land use regulation] waiver granted by Crook County and the development proceeding from such exercise, is transferable as legal lots for development; and, as it pertains to the division of land, lots created by a property owner under [a ORS 197.352] waiver...are legal lots that can be transferred to third parties who will then be able to construct residences on those legal lots of record...” (Motion 2 pg 1, ln 21 through pg 2, ln 3)
- II. State of Oregon -

Seeks a summary judgment declaring the second sentence of Ordinance 153, Section 12 invalid to the extent it permits transfer of a “waiver” to subsequent owner if the waiver is properly recorded.

Summary Judgment 1 - Claim Procedures

Crook County is a general law county. The Crook County Court is the governing body of the county. The governing body of a general law county possesses broad legislature authority over all matters of county concern. **ORS 203.035** Despite the broad grant of legislative authority, additional specific authority may be extended to such counties. ORS 197.352(7) is an example of such authority. The statute provides the County may:

“...adopt and apply procedures for processing claims under this act...” **ORS 197.352(7)**

The authority granted to counties is substantial, but not limitless. ORS 197.352(7) contains an example of a statutory limit upon the legislative authority of the County. The statute provides:

“...in no event shall these procedures act as a prerequisite to the filing of a compensation claim under subsection 6...[of ORS 197.352]...” **ORS 197.352(7)**

If a legislative action by a county offends the constitution or enters into an area which has been pre-empted by an action of the Legislature, then the county ordinance could be declared invalid by a court. See, **LaGrande/Astoria v PERB 281 Or 31 (1978)**

ORS 197.352(6) creates a cause of action for compensation in circuit court if a land use regulation continues to apply 180 days after a county has received a written compensation claim under ORS 197.352. The essence of the issue presented summary judgment 1 is whether the requirements expressed in Section 5 of Ordinance 153 act as a prerequisite to the filing of a claim for compensation under ORS 197.352(6) and, as a result, offend ORS 197.352(7).

Without going into detail, Ordinance 153 treats a land owner’s claim for compensation as filed “...on the date it is filed with the office of the legal counsel...regardless of whether the filing requirements are met...”. **Ordinance 153 Section 5(M)** Ordinance 153 Sub-sections 5(A) through 5(M) set forth several basic requirements which must be met before a claim will be “deemed complete”. The appropriate county official has a duty to review the claim for timeliness and completeness. **Ordinance 153 Section 6(B)** Upon being “deemed complete” the County hearing process would commence. **Ordinance 153, Section 6(C)** Again, Martins and Reimenschneider refused to supply all of the materials enumerated as necessary by the County before it would deem the claim complete. Notwithstanding the lack of compliance, the County acted upon both claims.

This court’s authority to conduct a judicial examination of the ordinances under ORS 33.710 through ORS 33.720 is not without limit. ORS 33.710(4) provides as follows:

Letter to Counsel
August 1, 2006
Page 5

“...Nothing in this section allows a governing body to have a judicial examination and judgment of the court without a justiciable controversy...”

The doctrine of justiciability is constitutional in origin. **Utsey v Coos County 176 OR App 535 (2001)** In the simplest terms - - courts can not render advisory opinions. Said another way, the controversy before the court must involve “...some injury or other impact upon a legally recognized interest beyond an abstract interest in the correct application or validity of the law...”. **League of Oregon Cities v State of Oregon 334 Or 645, at 658 (2002)** ; See also, **Eckles v State of Oregon 306 OR 380 (1988)** A controversy is justiciable when: 1) the interests of the parties are adverse to one another; and 2) the decision of the court will have some practical effect upon the rights of the parties to the controversy. **McIntire v Forbes 322 Or 426 (1996)** The Court of Appeals in an exhaustive discussion of justiciability noted the following in dicta:

“...justiciability is so important that it must remain satisfied throughout the litigation not just at the time of filing. Thus, if a claim is justiciable at the time of filing, but events transpire that later would deprive a court decision of a practical effect on the Plaintiff or petitioner, the claim is no longer considered justiciable. It is moot...” **Utsey, supra at 540; see also Brumnett v PERB 315 Or 402 (1993)**

Upon the filing of its Petition in the case at bar Crook County had an interest in determining the constitutionality of ORS 197.352, whether or not the procedures adopted by the County Court offended ORS 197.352(7) and the legality and regularity of the provisions of Ordinance 155. At the commencement of the proceeding a dispute existed between the County, Martins and Reimenschneider about the impact of Section 5 of Ordinance 153 on a claimant’s ability to present a claim before the County Court and, potentially, to initiate a claim in the Circuit Court under ORS 197.352(6). At that time a decision by this court would have had a practical impact upon the rights of the parties. However, the Crook County Court heard and acted upon both parties claims without regard to the completeness of the claims. Since this court’s decision would no longer have any practical effect on the parties, it has become moot. Mr. Hunnicutt is not an elector, resident or freeholder in Crook County. While it is true he has an understandable and passionate interest in the proper application and administration of ORS 197.352, the record fails to reflect any legally recognized injury or impact “...beyond an abstract interest in the correct application of the law...” **League of Oregon Cities, supra, at 658** Consequently, his interest is not ripe. The application of Ordinance 153 procedures to unknown freeholders with unknown circumstances is nothing more than a hypothetical exercise. Finally, the constitutionality of ORS 197.352 is settled. **Macpherson v DAS 340 Or 117 (2006)**

Summary judgment motion #1 is denied because no issues raised by the motion present a justiciable controversy.

Letter to Counsel
August 1, 2006
Page 6

Motions for Summary Judgment - State of Oregon and Martin/Reimenschneider 2 - Transferability

Martins' claim for compensation was filed with Crook County on December 23, 2004. On June 22, 2005, the Crook County Court made a decision upon the claim and issued Order 2005-61. The text of the order is set forth in the statement of facts herein. The County Court did not elect to remove or modify land use regulations. It elected to not apply certain regulations. In common parlance this action is often referred to as a "waiver." Martins intend to divide their land, sell the created lots to third parties and, in so doing, rely upon Crook County Court Order 2005-61, ORS 197.352 and the provisions of Section 12 of Ordinance 153.

One could argue even this dispute is not justiciable. Martins must apply for a conditional use permit to proceed. Even if they proceed, there is no certainty a conditional use permit would be allowed by the appropriate authority. Ordinance 153 provides, and Crook County asserts, the waiver is transferable and landowners such as Martins may proceed with their plans after complying with the conditional use procedures. The State of Oregon argues second sentence of Section 12 is invalid. The dispute between the State and the County has existed from the outset of the proceeding. Martins dispute changed during the pendency of the case from a dispute about claim procedures under Section 5 to a dispute about the scope of the ability to transfer "waived" property under Section 12. The change was immediate upon the execution of Crook County Court Order 2005-61. Accordingly, these facts establish: 1) a present controversy between Crook County, Martins and the State of Oregon; 2) the parties have adverse interests; and 3) a decision about the validity of Ordinance 153 Section 12 would have a practical effect upon the rights of parties before the Court. Consequently, this court must examine the relationship of the second sentence of Ordinance 153, Section 12, ORS 197.352 and the general land use law in the State of Oregon.

This court and the parties agree: 1) Ordinance 153 Section 12 appears to authorize the transfer of a property recorded "waiver"; and 2) no provision within the text of ORS 197.352 expressly permits or prohibits the transfer of a "land use regulation waiver". Therefore, this court must discern the intent of the voters to clarify the relationship of the enactments.

When a court delves into interpreting a statute its task is to discern the intent of the legislature. **ORS 174.020** In **PGE v Bureau of Labor and Industries 317 Or 606 (1993)** the Supreme Court carefully defined the methodology to be used by the courts of this State. The analysis is a multi-level procedure. First, the court must examine the text and context of the statute. The text of a statute is the best evidence of legislative intent. **State v Person 316 Or 585 (1993)** Courts may not insert what has been omitted or omit what has been inserted. **ORS 174.010** Words of common usage should be given their ordinary meaning. The context of a statute includes all provisions within the questioned statute and other related statutes. **Southern Pac. Trans Co v Dept of Revenue 316 Or 495 (1993)** The specific statutory intent should

Letter to Counsel
August 1, 2006
Page 7

control over a general inconsistent intent. If possible, the construction of a statute's intent should give effect to all statutory provisions. **ORS 174.010** If the text and context reveal a clear intent, then additional inquiry is unnecessary.

If the intent of the legislature is not clear from the text and context, then the court must examine the legislative history in the next level of analysis. At this stage the court combines the legislative history with the text and context to determine if the intent is clear. If the intent is clear, the court stops at this point of the analysis. If the intent remains unclear, then in the final level of analysis the court must resort to the general maxims of construction combined with the text and context analysis "...to determine how the legislature would have intended the statute to be applied to the issue...". **PGE v BOLI, supra at 612**

In **Stranahan v Fred Meyer, Inc 331 Or 38 (2000)** the Oregon Supreme Court applied a very similar analysis in the context of an initiated measure. If the analysis of the measure takes the court past the text and context level and into an examination of the history of the measure, then court may examine materials that were available to the voters at the time of the adoption of the measure. **Ecumenical Ministries v Oregon State Lottery Commission 318 Or 551 (1994)** Examples of the relevant historical materials which the court could examine include ballot titles, voters pamphlet statements, newspaper articles and editorials that were available to the voters at the time of the election. **Ecumenical Ministries, supra, at 560, fn. 8**

Because this case involves the relationship between an ordinance and a statute it is an appropriate step to analyze both enactments. This court begins with Ordinance 153.

Section 12 of Ordinance 153 provides:

"Waivers of enactments or land use regulations, when granted in lieu of compensation, are not transferable to other properties. *A waiver properly recorded in the deed records of the county survives the sale or transfer of a property to new ownership.* The right to obtain a waiver does not survive the sale or transfer of property if an application for waiver was not made, awarded and recorded by the owner who was eligible to obtain such waiver..." (emphasis supplied)

It is the second sentence of Section 12 which the State asserts is invalid. A close examination of the sentence discloses a "... properly recorded waiver ... survives the sale or transfer of a property to new ownership ...", but the sentence does not describe the type of waiver being recorded or by whom the waiver is given. These uncertainties are clarified by the context of the sentence. This court must remember Ordinance 153 was adopted by the Crook County Court and intended to be used to process claims made under ORS 197.352. Ordinance 153 includes the potential for conducting a hearing upon the merits any filed claim. **Ordinance 153**

Section 6 A hearings officer or the County Court determines whether or not land use regulations imposed subsequent to the landowner's date of acquisition have diminished the value of the property. **Ordinance 153 Section 7** If the value of the land is diminished and just compensation is due, then a decision is made whether, in lieu of just compensation, the land use regulations and enactments should be waived. **Ordinance 153 Section 7** The County upon "...final approval of the decision..." is required to cause the decision to be recorded. **Ordinance 153 Section 7(Q)**

When the same term is used throughout a statute, it is an indication that the term has the same meaning. **Racing Com. v Multnomah Kennel Club 242 Or 572 (1966)** The term waiver is used in the first, second and third sentence of Section 12. The first sentence ties the term to an act done "in lieu of compensation." The third sentence refers to a process necessary to secure a waiver. As noted hereinabove, the balance of Ordinance 153 refers to a decision making process for ORS 197.352 claims and the terms used are consistent with Section 12. See, **Ordinance 153 Sections (5) and (6)**. It is clear from the text and context "waiver" as used in the second sentence of Section 12 was intended to refer actions by the County Court which waived land use regulations in lieu of compensation. Also, Ordinance 153 requires that the County record evidence of any final decision. Consequently, it is clear from the text and context of Ordinance 153 that the Crook County Court intended to allow the land use regulation waivers granted in lieu of compensation to survive the sale or transfer of the subject property to any new owner if the sale or transfer is made after the "waiver" is recorded.

The foregoing brings this court to the crux of the case. Is a land use regulation waiver transferable to any new owner or is the second sentence of Ordinance 153, Section 12 invalid? Since ORS 197.352 does not expressly permit or prohibit transfer of the "waiver", this court must conduct a text and context analysis.

There are several reasons existing the land use regulation structure is part of the context for ORS 197.352. The statute was adopted through the initiative process. By its own terms, it became part of Oregon's land use regulation system found in Chapter 197. The statute creates an exception to the duties imposed upon public entities by the broad land planning structure of the State of Oregon. The exception includes the authority to "...remove, modify or not apply..." otherwise validly enacted land use regulations. The authority does not extend beyond the scope described in ORS 197.352.

A working example of the contextual relationship is found in ORS 197.352(1). The statute acknowledges land use regulations may continue to change and develop because the text distinguishes between land use regulations adopted prior to December 2, 2004 and regulations adopted thereafter. Through these provisions, the act recognizes both current and future land use regulations have a potential to impact land use and provide a potential foundation for ORS 197.352(1) claims.

The text of ORS 197.352(1) entitles an owner of real property or an interest therein to be paid just compensation if: a) a public entity; b) enacts or enforces new land use regulations or enforces land use regulations enacted prior to December 2, 2004; c) which restrict the use of private real property; and d) the restriction has the effect of reducing the fair market value of the property interest. The right to compensation is not self executing. If an owner desires to make a claim for just compensation, the owner must file or present a written demand for compensation to the County. **ORS 197.352(4)** The owner entitled to make the claim is defined as "...the present owner of the property or any interest therein...". **ORS 197.352(11)(C)**

If each element of the statute has been met, then (and only then) the governing body is authorized, in lieu of compensation, to "...modify, remove or not apply ... land use regulations to allow the **owner to use** the property for a use permitted at the time **the owner acquired** the property ...". ORS 197.352 (8) *emphasis supplied* It is interesting to note the County's authority to grant a "waiver" is limited to the present owner and the waiver may extend to uses permitted when the owner acquired the property.

The text of ORS 197.352(3)(E) also deals with the impact of the date of acquisition in another context. Specifically, the text of ORS 197.352 (3)(E) expressly bars a claim under ORS 197.352 (1) if the claim is based upon land use regulations enacted prior to the date the owner acquired the property. Stated another way, since a landowner can not base a claim on land use regulations enacted prior to the date of acquisition, the public entity has no authority to grant a waiver of regularly adopted land use regulations to the owner if the regulations were adopted prior to the owner's date of acquisition. This subsection does not distinguish between present and future landowners therefore it applies both types of owner.

Even the foregoing is not as straightforward as it seems. The date of acquisition is defined as the earlier of : 1) the date an interest in real property is acquired by the owner; or 2) the date the present owner's family member who was a predecessor in interest acquired the property. It would appear a present owner's date of acquisition may relate back to the date of acquisition of a family member if the present owner acquired the property through purchase or inheritance from the family member.

This court concludes ORS 197.352(1), (3)(E), (8) and (11)(B) demonstrate that the voters intended the date of acquisition to be a significant date. This conclusion is consistent with the history of the Measure contained in the Voters Pamphlet:

"...The term "owner" includes the current owners of the property. If the current owner sells an interest in her property, so long as the current owner still has a possessory interest or a reversionary interest in the property the provisions of [ORS 197.352] apply using the date the current owner acquired the property. Only, if a current owner sells all of her interest in a piece of property does the date

of acquisition change for the purposes of determining what regulations are subject to [ORS 197.352]..." Argument for-Furnished by Dorothy English, Barbara Prete, Eugene Prete

The text, context and history of ORS 197.352(3)(E) establish a new owner of real estate who purchases all of the interest in a parcel of real property acquires the property subject to the land use regulations in force at the time of the date of acquisition. In this context "land use regulations" include the administrative rules and goals of the Land Conservation and Development Commission, comprehensive plans and zoning ordinances. **ORS 197.352(11)(B)** Only two exceptions to this principle exist: 1) if the landowner retains a possessory or reversionary interest in the property the date of acquisition does not change and; 2) if the landowner acquires the property from a family member, the date of acquisition relates back to the prior owner. The exceptions reinforce this court's conclusion because both exceptions focus attention upon the original date of acquisition. No exception within the statute permits a "waived landowner" to convey all of the owner's interest in land to an unrelated new owner and allow the new owner's interest to relate back to "waived owner's" earlier date of acquisition. This court may not insert what has been omitted.

The following factual scenarios illustrate the impact of the text of ORS 197.352(3)(E) upon future owners:

- ① Smith sells or transfers all of his interest in a parcel of land to Jones. Assuming no land use regulation changes have impacted the property, the only impact of the of the sale or transfer under ORS 197.352 is to update the date of acquisition. No claim under ORS 197.352 has accrued.
- ② Smith sells or transfers all of his interest in a parcel of land to Jones. In this example the court will assume: a) modest land use regulation changes have occurred and the changes modify the uses of the property which may be made by the new owner; and b) the changes have not diminished the value of the property. Again, the only impacts of the sale or transfer for the purposes of ORS 197.352 are to update the date of acquisition and the land use regulations in effect at the new owners date of acquisition apply. No claim under ORS 197.352(1) accrues.
- ③ Smith sells or transfers all of his interest in a parcel of real property to Jones. For the purposes of this example, the court will assume: (a) significant land use regulation changes have occurred since Smith's date of acquisition; (b) the value of the subject property has been diminished; and (d) Smith has not filed a claim under ORS 197.352. A new date of acquisition is established by operation of law and Mr. Jones for the purposes of the statute takes the parcel subject to the land use regulations existing as of his date of acquisition. A future claim under ORS

197.352(1) by Jones, if any, may proceed only based upon future land use regulation changes.

- ④ An exception exists if Mr. Smith retains a reversionary or possessory interest in the subject property. In that context the date of acquisition does not change.
- ⑤ Another exception to the pattern may exist if Jones and Smith are related in the manner defined in ORS 197.352(11)(C). The text of ORS 197.352(3)(E) preserves Smith's earlier date of acquisition and, therefore, the potential to assert an ORS 197.352 claim survives if land use regulation changes establish an otherwise valid basis under ORS 197.352(1).

Under ORS 197.352 the present owner, who qualifies for and receives a waiver, may exercise any use of the property which was allowed as of the date the owner acquired the property. The landowner's opportunity to exercise these uses even though the uses would have been prohibited under existing land use regulations is the primary benefit of the waiver. So long as the date of acquisition remains tied to the date the "waived owner's" acquired the property, the opportunity to continue the "waived owner" uses remains in place. Consequently, a "waived owner" may commence the permitted uses in at least two different ways: 1) Sell the land to a third party and retain a possessory or reversionary interest in the property (the third party actually commences the use); or 2) Commence the use on his or her own behalf.

What happens when the waived landowner is ready to convey all interest in the property to an unrelated third party? While the waived owner's right to use the property is protected under ORS 197.352, no statutory exception exists which would allow the owner to transfer all interest in the property and preserve for the new owner the right to use the property under the waiver. In addition, an unrelated third party takes the property subject to all land use regulations enacted prior to the date of acquisition and it is therefore likely the "waived uses" are prohibited under the applicable land use regulations. The new owner can not secure a waiver from pre-existing regulations and the governing body can not grant one.

Historically, if an owner exercised a permitted use and the use became restricted or prohibited by the application of newly adopted land use regulations, then the owner's use could survive the regulation change if the use became vested. Clackamas County v. Holmes, 265 Or. 193 (1973). To acquire a vested right the owner must have engaged in substantial effort or have made substantial investment. Clackamas County v. Holmes, supra, at 197. If the owner failed to meet the test, the use could be lost. Fountain Village Development Co. V. Multnomah County, 176 Or App 213 (2001). Whether or not the tests have been met is a case by case determination. ORS 197.352 did not repeal this doctrine.

Letter to Counsel
August 1, 2006
Page 12

At this juncture ORS 197.352 and the historic doctrine of vested rights complement one another. The waived owner that exercises a permitted use and makes a substantial effort or substantial investment in the use may continue and convey the use to a new owner even though the land use regulations change. The vested use survives the transfer and may continue so long as the use is not materially altered by the new owner.

The doctrine of pre-emption relates to issues involving conflicts between local ordinances and statewide legislative enactments. In LaGrande/Astoria v PERB the Oregon Supreme Court held a local ordinance is pre-empted when:

“...a local rule in truth is incompatible with the legislative policy either because both can not operate concurrently or because the legislature meant its law to be exclusive...” LaGrande/Astoria v PERB 281 Or 137, at 148 (1978)

But the court indicates the application of the doctrine should be done with caution because:

“...It is reasonable to interpret local enactments, if possible, to be intended to function consistently with state laws and equally reasonable to assume that the legislature does not mean to displace local, civil or administrative regulation of local conditions by a statewide law unless the intention is apparent...”
LaGrande/Astoria v. PERB, supra 148-49

As described above, before a waived owner transfers all of the owner's interest in the property, the owner must engage in sufficient effort to vest the uses. Otherwise, a new owner is unable to preserve the waived owner's use. On the other hand, a Section 12 waiver is perfected upon recording. It would allow the waiver to be transferred down the chain of title. This would mean the waiver and the uses permitted thereunder could survive the impact of the change of the date of acquisition without any vesting efforts. This Court concludes the second sentence of Section 12 can not operate concurrently with ORS 197.352 and the related context of Oregon's planning and land use regulation structure. Consequently, the second sentence of Section 12 is pre-empted.

County Court's order which permits Martins the ability to apply for a conditional use permit under earlier land use regulations is undisturbed. Martins may proceed under ORS 197.352. How Martins elect to proceed and what actions, efforts or investments are made does not present any issue to this court at this time.

The State of Oregon's motion for summary judgment is granted. Martin and Reimenschneider's motion is denied. Finally, all other aspects of the case are dismissed for lack of justiciability.

Letter to Counsel
August 1, 2006
Page 13

Ms. Georges, please present the proper order and judgment.

Very truly yours,

George W. Neilson
Presiding Circuit Court Judge

GWN/jss